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REFORMING CHILD CUSTODY AND ACCESS LAW IN CANADA: A DISCUSSION PAPER

Brenda Cossman* & Roxanne Mykitiuk**

In March 1993, the Department of Justice, Canada, published and circulated a public discussion paper on child custody and access.¹ Building on the public responses generated by the 1993 paper and more recent public and political responses to the reform of federal child support law, the Department has been attempting to clarify its approach to developing reforms to the law and practice of custody and access. We have identified seven issues that are in need of further debate and consideration: (I) finalizing the basic objectives and principles of child custody law; (II) identifying the features of a child

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¹ Department of Justice, Custody and Access Public Discussion Paper (Ottawa: Minister of Supply and Services Canada, 1993).

focused approach; (III) incorporating the need for certainty and the desire to minimize future litigation; (IV) developing a general policy encouraging optimal parental contact; (V) developing a legislative framework that protects children and their mothers from abuse and violence; (VI) developing an approach to deal with high-conflict child disputes; and (VII) exploring process issues. This discussion paper is organised around these seven issues. Throughout the discussion of these issues, we identify an additional theme that requires further examination and consideration in the discussions regarding the reform of child custody and access law, namely, addressing issues of gender equality.

In this discussion paper we provide a preliminary examination of these issues. We canvass the possible justifications and criticisms of what appear to be the key parameters within which the legal reform of child custody and access is contemplated. Throughout this paper, we raise issues that we believe need further discussion and debate. We elaborate on the possible meanings and implications of these issues and raise specific questions that are urgently in need of further debate in the current public policy deliberations around the reform of child custody and access in Canada.

I. OBJECTIVES OF CHILD CUSTODY LAW

In the Federal Government's Public Discussion Paper March 1993, the following objectives were set out and well received:

- a. It is important that legislation be carefully developed in terms of the values it implies, the assumptions it makes about parenting after divorce and the language it uses to express its basic orientation;
- b. A new approach should focus on the needs and rights of children and concentrate on parental responsibilities and obligations rather than parental rights;

- c. Where parties have shown that they are capable of working together, the continued participation of both parents in the lives of their children following divorce should be encouraged;
- d. The continuing use of children as pawns in one parent's struggle to control must be minimized;
- e. Children and spouses who have been victims of abuse or violence must be protected against further harm;
- f. Individualized arrangements between parents and their children should be permitted and encouraged;
- g. The reality that most arrangements are worked out without the need for court interventions should be recognized.²

Questions:

- The first question to be addressed is whether these are the most appropriate objectives for child custody law, and whether there are any additional objectives that ought to be included.
- The second and more challenging question is how these objectives might be incorporated and realized within a regulatory framework.

In the sections that follow, we will consider these objectives, and the challenges of designing a child custody law premised on these objectives.

II. IDENTIFYING FEATURES OF A CHILD FOCUSED APPROACH

In this section, we discuss a number of issues and dilemmas in

² *Ibid.*

identifying a child focused approach to custody and access. Since the development of a child centred approach is, in many ways, the driving force behind the reform of child custody and access, we have devoted much of the discussion paper to this issue.

A. Justifying a Child Centred Approach

According to the Department of Justice, one of the primary objectives of custody and access law reform in Canada should be to "focus on the needs and rights of children and concentrate on parental responsibilities and obligations rather than parental rights."³ This goal of focusing on the needs of children following marital breakdown has been emphasized by experts working in the field of child psychology and development.⁴ While this is a laudable goal, determining the needs and rights of children in general, and those of a specific child, is a difficult task. Moreover, fashioning legal rules, principles and processes which will enable the determination and fulfilment of children's needs and rights post-divorce is extremely challenging.

There is a prevailing view in the recent literature, which is also reflected in the wider culture, that children are hurt and disadvantaged by divorce. These "injuries" occur on at least two levels. First, the social and legal process of parental separation or divorce and the disruption this causes in the life of a child is documented to have a number of negative effects on children. Second, the aftermath of divorce and its effects on the new arrangements within which children carry on relationships with each of their parents (and their parents with each other) have been found to have undesirable consequences for some

³ *Ibid.* at 38.

⁴ Families in Transition, "Custody and Access: A Response to the Department of Justice Discussion Paper, (unpublished manuscript, on file with authors, 1993) at 9-10.

children.

Current calls for reform to the law structuring parent-child relationships following marriage breakdown suggest that a child centred approach could alleviate some of the negative consequences of divorce for children. The adversarial system within which child custody determinations are presently resolved, the legal concepts of custody and access which structure the allocation of the legal rights and responsibilities of parents following divorce, and the best interests of the child standard, according to which parental rights and responsibilities are conferred, have all been criticized for aggravating the effect of divorce on children. Bala and Miklas note that, "[t]he 'best interests of the child' standard offers judges little real guidance for deciding a child's future, while the archaic concepts of custody and access unnecessarily constrain flexibility and thinking."⁵ The major impetus for legislative reform, therefore, is to facilitate the adjustment of children in separating and divorcing families.

What does it mean, however, to take a child focused approach to decision making about children in the context of separation and divorce? What are the elements of a child focused approach to the law of custody and access? Furthermore, what legal rules, principles, presumptions and processes will best ensure that the interests and needs of the children of separating couples will be met and remain central to the rules and processes of decision-making governing the reshaping of the parent-child relationship upon marital breakdown? Surprisingly, while a cursory review of the recent legal literature pertaining to custody and access reform generally favoured the adoption of such an approach, it was almost silent about what such a perspective would entail.

⁵ Nicholas Bala and Susan Miklas, *Rethinking Decisions About Children: Is the "Best Interests of the Child" Approach Really in the Best Interest of Children?* (Toronto: Policy Research Centre on Children, Youth and Families, 1993) at 1-2.

Indeed, a number of authors recognized the need for further inquiry into this issue.

It is our view that a child centred approach consists of several distinct elements which, in turn, raise a number of issues and potential hurdles for legal reform. In this discussion paper, we identify those elements and explore their possible implementation within the substantive law and legal process. We then offer a preliminary critique of some of the possible implications of adopting and implementing a child centred focus as identified in the literature and as exemplified by the experiences of those jurisdictions in which such an approach has been adopted.

A major presumption behind the current effort to reform the law stems from an assumption and a desire to improve the process in a manner that would minimize the negative impact of the legal process on the wellbeing of children. To the extent that the current rules that govern the determination of parent/child relationships aggravate the effects of divorce for children, these legal rules have become the focus of reform. The search for alternatives to the current regime must therefore examine which changes to the law might alleviate or improve the negative impact on children. Such changes might include substantive changes in the law (such as the use of legal categories like custody and access) as well as procedural reforms such as parental education or alternative forms of dispute resolution. Nevertheless, in contemplating these reforms one should not lose sight of the intrinsically painful social consequences of divorce and therefore, the limited capacity of legal reform and the legal system to mitigate or remedy effects imbedded in the social process of marital breakdown.

B. Elements of a Child Centred Approach

A review and synthesis of recent literature regarding children, the process of divorce and the possible reform of the law of custody and access suggests that the following factors have been identified as central to a child centred focus.

1. *Changing the Language*

The terminology of custody and access has come under considerable criticism, and many commentators have suggested that the language be amended. As the Discussion Paper observed, the terms “custody” and “access,” drawn from criminal law and property law respectively, may be inappropriate in the restructuring of parenting relationships following marital breakdown. Some have suggested that the terminology promotes the win/loss mentality that plagues child custody and access disputes. Bala and Miklas, for example, argue that changing the words may help “lower the stakes (and temperature) when parents disagree.”⁶ Others have noted the confusion that has come to characterize the term “custody,” mixing as it does the concepts of decision making authority and care-giving. Others, along similar lines, have suggested that custody and access be abandoned in favour of phrases such as “care time” and “decision responsibility.”⁷

Some have suggested that “custody” and “access” should be replaced with the concept of “parenting” or “shared parenting.” This approach has been introduced in a number of American jurisdictions. The State of Washington introduced the *Parenting Act, 1987* which replaced the language of “custody” with the language of “parenting” and identified four general areas of “parenting”:

1. the child’s residential arrangements
2. the financial support of the child
3. the allocation of decision making authority

⁶ *Ibid.*

⁷ Gary Austin, “Response to Custody and Access: Public Discussion Paper” (unpublished manuscript, on file with authors, 1994).

4. the process of dispute resolution.⁸

More recently, Australia made a similar change in its legislation. Custody, access and guardianship have been replaced in the *Family Law Reform Act 1995* with the concept of "parental responsibility." Under the new law, each parent has parental responsibility for the child, and this responsibility continues to exist despite any change in the nature of the relationship of the child's parents.⁹ "Parental responsibility" is defined as covering "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children." Under the new law, custody and access orders are replaced with parenting orders, specifically: residence orders, contact orders, specific issue orders, and maintenance orders.

These, and other similar reforms have been driven by the desire to frame issues of child custody within terminology that focuses on children's needs and parental responsibilities – terminology that hopes to change the "winner takes all" mentality of "custody" and "access," and facilitate more parental cooperation upon marital breakdown.

There are many issues to consider in evaluating these new reforms to child custody law. In this section, we focus on the change in language. It is certainly the case that the current terminology of "custody" and "access" has become emotionally and legally loaded. It is, however, important to consider what can reasonably be expected from a change in terminology. As Maccoby and Mnookin have argued in their work, there are real limits to the role that law can place in changing the patterns of post-divorce parenting behaviour.¹⁰ Simply changing the

⁸ State of Washington Parenting Act of 1987, Wash. Laws. C.460 (codified at Wash. Rev. Code ss. 26.09)

⁹ Section 61C(1) and (2) of the Family Law Reform Act, 1995.

¹⁰ E. Maccoby and R. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Cambridge: Harvard University

language of the law is not very likely to alter significantly the way in which parenting responsibility is allocated. And it appears to be the allocation of parenting responsibility before the relationship breaks down that plays a critical role in post-divorce conflict.

Changing the language of custody and access will not and cannot change the extent to which child-care responsibility continues to be allocated in a highly gendered manner. As Maccoby and Mnookin write, "despite some revolutionary changes in the law to eliminate gender stereotypes and to encourage greater gender equity, the characteristic roles of mothers and fathers remain fundamentally different."¹¹ Women continue to be disproportionately responsible for child care during the marriage.¹² Susan Boyd similarly argues that "[c]hanging the language or process through which we construct custody issues will not fundamentally shift the power dynamics structured by gender relations."¹³ In her view, it is "beyond the scope of family law [to] radically transform structural differences in child care"¹⁴ and it may similarly be "beyond the power of statutory language to make parents behave better or cooperate in child custody disputes."¹⁵

Press, 1992) at 279.

¹¹ *Ibid.* at 271.

¹² *Ibid.*; See also Susan Boyd, "Child Custody Law and the Invisibility of Women's Work" (1989) 96 *Queen's Quarterly* 831.

¹³ Susan Boyd, "W(h)ither Feminism? The Department of Justice Public Discussion Paper on Custody and Access" (1995) 12 *Can. J. of Fam. L.* 331 at 357.

¹⁴ Susan Boyd, "Potentialities and Perils of the Primary Caregiver Presumption" (1990) 7 *Canadian Family Law Quarterly* 1 at 27.

¹⁵ Boyd, *supra* note 13. at 358-359.

These words of warning on the limitations of statutory language need not be taken to imply that the terminology of custody and access should not be changed. But, it does suggest that we should be attuned to the limits of doing so. There are serious questions about what kind of behavioural changes can reasonably be expected to be brought about through a change to the statutory language. To the extent that the problems of custody and access are more structural ones – that the problems are deeply rooted in the gendered allocation of child-care responsibility – changing the language is at best a cosmetic approach. Indeed, this question of the structural nature of the problem is one that needs to be raised in relation to many of the suggestions for reforming the legal regulation of custody and access.

There is, equally, reason to be concerned that the new language will become as loaded as the old, since it is not the language per se that is at issue, but rather, the restructuring of parent-child relationships. The allocation of “primary residence” and/or “decision responsibility” to one parent may, under a revised scheme, also become the focus of an emotionally explosive conflict. There is nothing inherent in the language of custody and access on the one hand, or shared parenting (and its allocation of primary residence and decision making responsibility) on the other, that makes either more or less conflictual in nature. The language of custody and access is conflictual because it has been for many years the language within which parental disputes have been cast and fought out. Shared parenting may seem to hold out new promise, simply because it has not yet become the site of fierce contestation.

There does, however, appear to be considerable support for the introduction of new and less adversarial language. Rhonda Freeman, for example, has argued strongly in favour of changing the terminology in a way that simplifies it, while specifying the responsibilities of parents, and reflecting the nature of the parent/child relationship in a respectful manner. But as Freeman herself recognizes, “language alone . . . will not be sufficient to address the inadequacy of the adversarial arena

as a means of resolving parenting after divorce dilemmas.”¹⁶

Questions:

- The general question is whether the language of “custody” and “access” should be changed.
- The related, and even more difficult question is what terminology could be put in its place.

Even assuming that there is some degree of consensus emerging regarding the need to change the language of child custody, such consensus may be more elusive in the context of the precise language that would be considered appropriate. To agree with the need to change the terminology is not necessarily to endorse the language and approaches of “shared parenting,” and “parenting orders” that have been adopted in the last few years in other jurisdictions. These are the issues to which we turn in the subsequent sections.

2. *General Factors Common to All Children – The Needs and Rights of Children*

The following sources have been referred to as providing a foundation upon which the needs and rights of children in the process of post-divorce parental decision making should be determined: The U.N. Convention on the Rights of the Child; the best interests factors set out in provincial statutes, factors identified in judicial decisions; and psychological and other social science literature. The needs and rights of children which should be considered in this context, as identified by those sources, including the following.

(a) The U.N. Convention on the Rights of the Child

Articles 9, 12 and 19 of the U.N. Convention on the Rights of

¹⁶ Families in Transition, *supra* note 4 at 9.

the Child guarantee children the right to contact with both parents; an opportunity to express their views in matters affecting the child and the right to be heard; and the right to be protected from all forms of violence. Article 18 recognizes that both parents have common responsibilities for the upbringing and development of their child. [See Appendix 'A' for the full text of these Articles.]

(b) "Best interests" factors deriving from provincial statutes and jurisprudence

Under the *Divorce Act*, the best interests of the child is the sole criterion upon which decisions about child custody and access are based.¹⁷ This term is not defined in the *Divorce Act* and the only statutory assistance provided regarding the interpretation of this provision is set out in sections 16(9) and (10).¹⁸

The best interest standard has been critiqued on a number of grounds. From a child centred perspective, it has been argued that the standard is too vague, that its interpretation is too easily influenced by judicial biases based on moral, religious and social views rather than on objective criteria, that it is too focused on assigning parents' rights rather than identifying children's actual needs and that its indeterminacy encourages litigation rather than promoting parental agreement.

Whether the best interests of the child standard should remain the decision making rule in decisions about post-divorce parenting is an important question. While some commentators have argued for the rejection of the standard altogether,¹⁹ others

¹⁷ Section 16(8) of the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.).

¹⁸ Section 16(9) provides that in making an order the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent. Section 16(10) outlines the "friendly parent rule."

¹⁹ See Bala and Miklas, *supra* note 5 .

have argued for reforms that might give more specificity and predictability to the standard. A number of alternative decision making rules have been proposed with which to replace or revise the best interests of the child standard. These include: a joint custody presumption; a primary caregiver presumption, a presumption of shared parenting; and a primary residence presumption.²⁰

It is important to note that a best interests of the child standard need not be used only within the context of a custody and access regime. Recent legal reforms in both Australia and the UK, for example, retain a role for the concept of "best interests" or "child welfare," within a legislated model of decision making which abandons the concepts of custody and access in favour of those of residence and contact.

Those who are in favour of retaining the concept of best interests as part of a restructured legal regime of post-separation parenting and dispute resolution have stated that specific factors or criteria should be spelled out in federal legislation as is the case in provincial and territorial legislation. This, they argue, provides assistance to all parties (in the context of both adjudication and negotiation) – judges, mediators, assessors and parents – in focusing decision making around children's needs and interests. Those factors which have been identified in Canadian legislation are set out in Appendix 'B'.

In addition to these factors, commentators have suggested others, which should be included in the panoply to be considered under the best interests standard (these are set out in Appendix 'B'). Regardless, however, of whether the best interests standard remains the decision making rule under a new regime for resolving post-divorce parenting, it will be useful to consider those factors which have been identified, as constituting one possible source of relevant information for evaluating decision making from a child centred focus.

²⁰ See Bala and Miklas, *supra* note 5 for a description and review of these concepts.

Many of the factors guiding the determination of the best interests of the child focus, not on identifying the needs and rights of the child and the corresponding responsibilities of parents, but on determining the individual whom it is anticipated will best be able to take care of these unidentified needs. While no one would dispute that decisions about post-divorce parenting arrangements should be made in the best interests of the child(ren) in question, we do need to consider whether the current legal (including judicial) understanding of the best interests standard (and criteria) offers an adequate approach to decision making from a child centred perspective. In this regard, it may also be useful to consider the orientation of the primary caregiver standard that focuses on the actual care giving activities undertaken by parents in order to meet the needs of their children. In the 1981 West Virginia Supreme Court of Appeals case of *Garska v. McCoy*,²¹ the court identified a number of factors which were to be considered in determining the primary caregiver of a child:

- preparing and planning meals
- bathing, grooming and dressing
- purchasing, cleaning and care of clothes
- medical care, including nursing and trips to physicians
- arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings
- arranging for alternative care, babysitting, day-care etc.
- putting child to bed at night, attending to child in the middle of the night, waking child in the morning
- disciplining, including teaching general manners

²¹ 278 S.E. 2d 357. For a general discussion, see Richard Neely "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1984) 3 Yale L. and Policy Rev. 168; Boyd, *supra* note 14.

- educating, i.e. religious, cultural, social etc.
- teaching elementary skills, i.e. reading, writing.

Because it focuses on the quotidian activities involved in meeting the needs of a child, this set of factors goes some way towards recognizing the daily responsibilities involved in parenting a child. In this sense, it makes a contribution to outlining some of the issues which must be addressed from a child focused perspective.

In addition to the legal sources which have been canvassed above, a number of commentators have proposed rights and principles which ought to guide a child focused approach to parenting decision making. Barbara Landau, for example, has stated that the children of divorcing parents have the following rights which need to be reflected in any arrangements made about post-separation parenting:

- protection from abuse
- fulfilment of basic needs
- relationships with both parents free from loyalty conflicts
- access to continued, consistent, and predictable relationships with significant others, and
- participation in the decision-making process.²²

Rhonda Freeman has recommended a number of principles upon which parenting decisions should be made which include:

- specific information about the needs of children

²² See generally Barbara Landau, "Family Law Reform – Where Do We Go From Here: Parent's Rights, Children's Rights and the Development of a Coherent Policy for Balancing of Interests" (1988) 26 *Concil. Crts. Review* 29; see also Barbara Landau, *Children's Rights in the Practice of Family Law* (Toronto: Carswell, 1986).

- a consideration of the child's needs at the present time and in the future
- the concept of continuity of care taking into account the child's age and stage of development
- a valuing of care-giving and the child's reliance on his or her relationship with caregivers, and
- a way for parents to make interim agreements without prejudice.²³

(c) Psychological and other social science research

A significant amount of social scientific literature documenting the effects of parental separation and divorce on children has been published in recent years. This research may be useful to the legal reform of custody and access by providing information on the developmental needs of children. In addition, it may be a valuable source of information about the variety of effects divorce has on children and provide some insight into ways to ameliorate some of the negative effects. A companion paper to this one, prepared by Rhonda Freeman, reviews the recent social science literature about the impact of divorce on children and offers suggestions for legal reform concerning decision-making about post-divorce parenting.²⁴

While recognizing the important contribution that social science literature can make to legal reform in this area, it is also important to recognize the limitations of some of this literature. Because of flaws in methods and samples, it has been suggested that divorce studies are of limited or varying use. Some studies

²³ Rhonda Freeman, "Parenting After Divorce: Rethinking Decisions about Children" in Bala & Miklas *supra* note 5 at 11. See also Rhonda Freeman, "Parenting After Divorce: Using Research to Inform Decision - Making About Children" (1998) 15 Can. J. Fam. L. 79.

²⁴ See Freeman, "Parenting After Divorce," *supra* note 23.

have used measures that assess pathological child behaviour to the exclusion of more healthy or coping behaviours. In addition, a number of studies have failed to obtain data from fathers and children and have not measured the quality of both parent-child relationships. While there is some convergence on some divorce-related findings it is important to note the extent to which they remain inconclusive or contradictory about important issues.

Questions:

- The general question is, What is a child centred approach to resolving custody and access issues upon marital breakdown?
- What are the elements of a child centred approach?
- How do we fashion a child centred approach that recognizes the heterogeneity of children and family arrangements?
- How can this approach be translated into the legal rules, presumptions, processes and practices which regulate the arrangements for post-divorce parenting?
- Should the “best interests of the child standard” be retained within a new custody and access regime?
- If so, what should its role be? If “best interests” is retained, should legislation set out factors to be considered in determining what is in a child’s best interests?
- What factors should be included?
- Must the legislated factors inform both the decision making of parents and the court, or apply only to court orders in situations where there is an absence of parental agreement?
- According to a child centred approach, what should be the standard or rule of decision making?
- Should the best interest standard include a presumption in order to give it greater specificity and predictability, and if so, which presumption would be appropriate?

- How do we determine what children's needs, rights and interests are?
- Who makes these determinations?
- What are the problems with the legal system adopting or including a therapeutic model of assessing children's needs?
- Might this not create a clash between legal and social science approaches to defining children's rights and needs?
- How does a therapeutic model account for systemic and socio-economic considerations?

3. *Attention to the Needs of Particular Children*

A child centred approach is one that can accommodate the changing developmental needs of children. For example, where initial custody/parenting determinations and arrangements regarding the child are made when the child is a toddler, those arrangements may not be appropriate to accommodate the needs of a six year old. Similarly, flexibility is not just a need of young children but is extremely important for adolescents whose needs and choices may require changes to pre-established arrangements regarding the terms structuring custody and access (or the parenting plan). The implications of recognizing that the child's developmental needs may constitute a "change of circumstances" requiring a variation of previously determined custody and access awards (parenting plans) need to be assessed. In circumstances where parents are generally able to cooperate, identifying and accommodating the child's changing needs may be worked out through negotiation between the parties. However, in situations of parental conflict, there are questions about who would be entitled to suggest that a child's needs have changed sufficiently to constitute a change of circumstances such that a variation of the parental roles and responsibilities in relation to the child should be considered. This issue arises especially with younger children whose opinions and assessments about their own needs are generally

not available. This aspect of a child centred approach also raises questions about whether a child would require independent legal representation by someone able to identify the child's needs and advocate a particular sharing of parental responsibilities. Where the parent of a child is permitted to argue that a child's developmental needs require a variation of arrangements there is a risk of parents using expressions of children's needs to antagonize or provoke the other parent.

Any regime which purports to be child centred will focus judicial attention on the child's needs. The legal process then, will require a set of procedures and standards within which to assess these needs. In practice, the legal system's requirement for objectivity privileges the assessments of professionals and experts who are presumed qualified to determine the needs of a child objectively and are capable of assessing which parent is best able to meet the child's needs. This approach ignores the fact the experts bring to the assessment process their own biases and interpretations.²⁵ Furthermore, the fact that in many provinces legal aid no longer pays for assessments may unduly prejudice the party who does not have a "professional assessor" on his or her side.

It is worth interrogating the assumption that an outsider to the parental context is best able to determine the objective needs of the child. Instead, means should be sought to bring the parents into an active effort to address the needs of the child in the context of a restructured parental relationship upon marriage dissolution.

One of the features of a child centred approach should require the parents of a child to identify, in so far as they are able, their children's needs and to suggest how those needs

²⁵ See Caplan and Wilson, "Assessing the Child Custody Assessors" (1990) 27 R.F.L. 120.; and Martha Fineman, "Custody Determinations at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality" (1989) 3 C.J.W.L. 88.

might be best met after marital separation. A component of this process may require that each parent identify the role and responsibilities of each parent towards the child. This will entail recognition of the roles and responsibilities expected of the other parent in order to meet the needs of the child. It is important that this parental assessment go forward in a non-adversarial setting to avoid loading the process in a manner calculated to damage the other parent.

Questions:

- How should a custody and access regime accommodate children's changing developmental needs?
- How do we distinguish among cases where disagreement between parents is a power struggle compared to those cases where it is a disagreement about assessing the child's interests?
- Do children require independent legal representation in custody and access determinations?
- What role should children play in defining their own needs?
- How much weight should be given to the views of children?

4. *Parental Responsibilities*

Concomitant with the recent approaches to the reform of custody and access which emphasize children's needs and rights, is a focus on parental responsibilities. It is a widely held view that the parental rights model of the current custody and access regime disadvantages children in at least two ways. First, by focusing on a determination of the best custodial parent, this "winner take all" approach increases the stakes for each parent and therefore, the opportunity for conflict among them. Parental conflict, and especially continued parental conflict, has been demonstrated to affect children's ability to adjust successfully to

post-divorce arrangements.²⁶ In addition, this approach focuses the inquiry about post-divorce parenting arrangements primarily on an assessment of the strengths and weaknesses of each parent rather than on a determination of what the child(ren) need(s) and how these needs can be met by both parents. Second, it has been suggested, that the current approach to custody and access has particularly troubling effects on the "access parent" whose role as a parent is now perceived to be that of a visitor in the child's life. For example, Bala and Miklas observe that non-custodial parents sometimes have virtually no involvement in the life of their children after separation, which may have negative psychological effects on the child. In addition, they note that parents who have no involvement with their children are less likely to honour child support obligations.²⁷

Since these problems with the current custody/access are the primary rationale informing a shift toward a regime which focuses on parental responsibilities, it is important to note the recent legal changes which have occurred with respect to access. The determination that a divorcing parent is either the custodial parent or the access parent has typically affected two issues: first, with whom a child would habitually reside and therefore the parent who had the daily responsibility of caring for the child and providing for that child's needs; and second, who had primary decision-making responsibility for the child with respect to such issues as education, medical care and treatment and religious education. As Bala and Miklas note, however, since the late 1980s the courts have been extending the legal rights of non-custodial parents, and have been promoting continuing involvement by both parents in the lives

²⁶ See Janet Johnson, "High Conflict Divorce" (1994) 4 *The Future of Children* 165.

²⁷ Bala and Miklas, *supra* note 5 at 95-96.

of their children.²⁸ The practical effect of these developments has been to increase the rights of non-custodial parents (usually fathers) in relation to their children and to permit them generous involvement in the lives of their children when they desire it. This, of course, has had implications for custodial parents whose practices, actions and decisions about parenting have been curtailed by the greater rights given to non-custodial parents.²⁹

What then, is to be gained by adopting a model which emphasizes parental responsibilities if the goal of such a model is to be more child focused? Upon an examination of the recent UK and Australian legislation it is ironic to find that the answer to this question is – increased parental authority and power for the parent with whom the child does not habitually reside. As all of the authors, writing in a recent edition of *The Australian Journal of Family Law*,³⁰ note, replacing the concept of parental rights with parental responsibilities increases the power and authority of those who are now known as “access parents.” This conclusion is rendered more curious, given that parental responsibilities is not defined in either piece of legislation, nor is the method by which shared parenting is to be achieved. (“Parental responsibilities” is defined in the Washington legislation.) It is possible (and quite likely) under this regime, that the residential parent will continue to have the burden of quotidian child care responsibilities while the non-residential parent will have increased decision making “responsibility” about the child’s educational, religious, residential and medical

²⁸ *Ibid.* at 97-103.

²⁹ The most significant example of this is the recent decision of the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 with respect to residence and mobility.

³⁰ See (1996) 10 Australian Journal of Family Law, which is entirely devoted to the recent *Family Law Reform Act 1995*.

needs and not only a right to be consulted about these matters. In addition, this parent will have responsibilities for the care of the child when they are together. As implemented in the UK and Australia, the concept of parental responsibility can lead to some highly problematic situations in practice. For example, because both parents retain decision making power in relation to their child[ren] each of them is able to make decisions about the child, provided that they are not in conflict with a court order, without consulting the other. Mom may enroll the child in one school on Monday and Dad can change schools on Tuesday, unilaterally, unless there is an existing court order prohibiting this activity. Therefore, while claiming to confer responsibilities on both parents, the effect of the UK and Australian legislation is, in fact, to confer additional *rights* on non-custodial parents. How this approach advances a child centred perspective must be questioned. This is not to suggest that an emphasis on parental responsibilities per se, is a bad idea. It is not, but it does indicate the necessity of clarifying what parental responsibilities are, how they are to be apportioned and how a focus on them will lead to better adjustment for children after divorce. Moreover, when no recent studies demonstrate that this new regime has improved the conditions and lives of children, altered patterns of child rearing for children, or led to increased involvement of fathers with their children, we should be very cautious about dismantling the current system without knowing that its replacement will achieve the stated objectives.

A second feature of a child centred approach would require the parents of a child to identify the structures of the parental relationship which would meet the needs and interests of the child. Parents who demonstrate a capacity to cooperate with each other will need to determine what the role and responsibilities to each other *qua* parents will be. To the extent the child will remain in contact with both parents post-marital breakup, some consideration will need to be given to the framework of communication between the two parents and the need to adjust and accommodate this framework to the development of the child.

Questions:

- Should a reformed custody and access regime include the concept of parental responsibilities?
- If so, what will this concept mean?
- Should parental responsibilities be set out in legislation?
- As a legal and practical matter how are parental responsibilities to be apportioned between the parents of a child upon marriage breakdown?
- How do we account for the frequently gendered way in which parental responsibilities are apportioned during a marriage?
- How should this fact influence the respective roles and responsibilities of parents upon divorce?

5. *Shared Parenting, Residential Parents and Parenting Plans*

In recent years a number of jurisdictions have made changes to the law relating to children following separation and divorce, and have moved towards an approach of shared parenting, parenting orders and parenting plans. In this section, we briefly review the reforms to the law of child custody and access in the UK, Australia and Washington State in the US. These reforms have sought to achieve similar objectives to those identified by the Department of Justice in its discussion paper: to move away from the language of parental rights, emphasizing shared parental responsibilities towards children regardless of the state of the parent's relationship; to resolve disputes about parenting arrangements outside of the courtroom wherever possible; to protect the child's right of contact with both parents. Significantly, both the *Children's Law Act 1989* (UK), the *Family Law Reform Act 1995* (Cth) and the *Washington State Parenting Act of 1987* eliminate the language of custody, guardianship and access and replace them with that of parental responsibility, residence and contact. While a detailed review of this legislation is beyond the scope of this paper, it will be

useful to canvas how these jurisdictions have attempted to give legislative effect to objectives that are similar to those identified by the Department of Justice which motivate law reform in Canada. Moreover, a brief review of some of the pitfalls that have been identified with these pieces of legislation should prove instructive for Canada's reform efforts.

(a) Washington State *Parenting Act of 1987*

The Washington State *Parenting Act of 1987* is often highlighted in these discussions, although a number of other US states have recently introduced similar legislation.³¹ The *Parenting Act* replaced the language of custody and access with the concept of parenting. According to the *Act*, all separating parents must put forward a proposed "parenting plan" to divide "parenting functions." Parenting functions are defined "as those aspects of the parent child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:

- a. maintaining a loving, stable, consistent, and nurturing relationship with the child;
- b. attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
- c. attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
- d. assisting the child in developing and maintaining

³¹ Colorado Rev. Stat s. 14-10-123.5(3) (1987); Ill. Rev. Stat. ch. 40, para. 602.1 (1980). See also Ohio and Oregon.

- appropriate interpersonal relationships;
- e. exercising appropriate judgement regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and
- f. providing for the financial support of the child.”³²

Parenting plans are required to set out the child's residential schedule, the allocation of decision making authority, and a dispute resolution mechanism. In deciding on the child's residential schedule, the greatest weight is to be given to “[t]he relative strength, nature and stability of the child's relationship with each parent, including whether a parent has taken a greater responsibility for performing parenting functions in relation to the daily needs of the child.”³³

The *Act* provides limitations on parenting plans, by specifying the particular contexts within which shared parenting would be inappropriate. Section 10 of the *Act* prohibits courts from requiring that a parenting plan include mutual decision making or designation of dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct:

- g. willful abandonment that continues for an extended period of time,
- h. physical, sexual, or emotional abuse of a child, or
- i. a history of acts of domestic violence as defined in the statutes defining domestic violence or an assault which causes grievous bodily harm or fear of such harm.

It also requires limitations on the child's residential time with

³² Washington *Parenting Act*, s. 26.09.004, (3).

³³ *Ibid.*, s. 26.09.187(3)(I).

the offending parents.³⁴

The objectives of the legislation include facilitating individualized private ordering; encouraging the continued participation of both parents in the lives of their children; focusing and educating parents on post-divorce responsibilities; and decreasing parental conflict.³⁵

(b) Australian Family Law Reform Act 1995

The Australian *Family Law Reform Act 1995*,³⁶ which revised Part VII of the *Act* dealing with children has also significantly reformed the law of child custody. As mentioned above, this *Act* replaces “custody” and “access” with the concept of “parental responsibility,” and parenting orders. The *Act* provides that each parent has parental responsibility, defined as “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.” This parental responsibility is not affected by changes in the nature of the relationship between the child’s parents.

The *Act* also provides for parenting orders, which

³⁴ *Ibid.*, s.26.09.191 (b) “the limitations imposed by the court shall be reasonably calculated to protect the child from physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. If the court expressly finds limitation on the residential time with the child will not adequately protect the child from harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.”

³⁵ For further discussion, see Jane Ellis, “Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals” (1990) 24 *Univ. of Mich. J. of L. Reform* 65 at 80-91.

³⁶ *Family Law Reform Act 1995* (Cth).

confer specific parental responsibility on a parent: residence orders (with whom the child lives), contact orders (with whom the child should have contact), specific issue orders (other aspects of parental responsibility), and child maintenance orders. According to section 61D, "a parenting order does not take away or diminish any aspect of the parental responsibility of any person" unless "expressly provided for in the order; or necessary to give effect to the order."

The *Family Law Reform Act 1995* also encourages parents to enter into parenting plans rather than seeking a court order.³⁷ Parents are encouraged to reach their own agreements about the future parenting of their children. If they do negotiate a parenting plan, the plan must be filed with the Court, with supporting information (including a statement that each party received independent legal advice and that the plan was developed after consultation with a family and child counsellor). The Court is only to register the plan if it is in the best interests of the child, and retains the power to set aside or vary the plan. The Court thus retains a considerable supervisory role in relation to parenting plans.³⁸

(c) UK Children's Act 1989

The UK *Children's Law Act 1989* similarly replaces custody and access with the concept of parenting responsibility and introduces the concepts of residence and contact. The scheme is substantially similar to that in Australia, except that the UK *Act*

³⁷ *Ibid.*, section 63B.

³⁸ For a further discussion of the Family Law Reform Act, see Richard Chisholm, "Assessing the Impact of the Family Law Reform Act 1995" (1996) 10 Australian Journal of Family Law 177; Richard Ingleby, "The Family Law Reform Act – A Practitioner's Perspective" (1996) 10 Australian Journal of Family Law 48.

places much greater emphasis on private ordering, and on the private choices of individual parents. As John Dewar describes: "there is an explicit direction to the courts that they should only make an order if it can be shown that to do so would be better for the child than making no order at all."³⁹ Moreover, the role of the court is reduced since "the requirement that a court declare itself satisfied with the arrangements being proposed for the children of divorcing parents before granting a decree absolute of divorce has been replaced by the weaker provision that the court must simply consider whether to exercise any of its powers under the Act."⁴⁰ The objective of reducing the involvement of the court in divorce proceedings in the UK is further demonstrated by the role the welfare checklist plays in the legislative regime. Pursuant to the *Children's Act* (s. 1(1)), the welfare of the child is to be the court's paramount consideration when deciding any question with respect to the upbringing of the child. The *Act* includes a statutory checklist of factors to be considered in determining the welfare of the child, and this list is to be applied by the court when there is a contested application for a contact or residence order. However, as Dewar notes, "there is no obligation on parents to take account of the checklist, nor even of their child's welfare, *when reaching agreements between themselves*"⁴¹ (Emphasis added).

³⁹ Dewar, "The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared – Twins or Distant Cousins?" (1996) 10 *Australian Journal of Family Law* 18 at 20.

⁴⁰ *Ibid.* at 20-21

⁴¹ *Ibid.* at 21. For a further discussion of the *Children's Act 1989*, see Janet Walker, "Introduction: Whose Responsibility? A Question of Balance" (1991) 29 *Fam. and Concil. Crts. Rev.* 359; A. Bainham, "The Privatisation of the Public Interest in Children" (1990) 53 *Modern L. Rev.* 206; A. Bainham, "The Children's Act 1989: The State and the Family" (1990) 20 *Family Law* 231; and A. Bainham, "The Children's Act 1989: Welfare and Non-Intervention" (1990) 20 *Family Law* 143.

(d) General Observations

In both the Australian and UK context, the concept of parental responsibility is a broad one. While the exercise of a parent's responsibility may be subject to court order, the concept of parental responsibility allows each parent of a child to exercise the entire panoply of parental responsibilities without consultation with the other parent unless they are precluded from doing so by the operation of another court order. In practice what this does is to confer freedom of action and decision making on either parent regardless of whether he or she is the residential parent of that child, provided that the parent acts within the scope of parental responsibility and is not in violation of a court order.

Despite how broad the concept of parental responsibility, the term is defined in only the most general way in both the UK or Australian *Acts*.⁴² As Justice Peter Nygh notes "the Law Commission [of England] did not consider it practicable to provide a statutory list of powers and duties."⁴³

It is also important to note that the effect of the new parental responsibilities regime is to confer increased legal power on the parent who is not responsible for the day to day care of the child (usually the father). "Whereas an order for custody was a very important source of parental rights for a parent, so that a great deal hung on what order the court made, parental responsibility . . . is allocated independently of residence."⁴⁴ Residence orders deal with the practical day to day

⁴² By way of contrast, the Washington State *Parenting Act* does include a definition of parenting.

⁴³ The Honourable Peter Nygh, "The New Part VII – An Overview" (1996) 10 Australian Journal of Family Law 4 at 7.

⁴⁴ John Dewar, *supra* note 39 at 21.

care arrangements for a child, and in the absence of an additional specific issues order, will not affect the legal power and responsibilities of non-residential parent.

(e) Evaluation and potential applicability to the Canadian context

Some Canadian commentators have endorsed this new shared parenting approach. Bala and Miklas have argued that a shared parenting approach be adopted in Canada. In their approach to shared parenting, the child's residential parent would be determined by a primary caretaker presumption.⁴⁵

Others are more cautious or critical of the shared parenting approach. Many feminist commentators have been critical of shared parenting and parenting plans. Susan Boyd rightly cautions against rushing to follow the lead of US jurisdictions, and their "flavour of the month" approach to child custody and access.⁴⁶ An early study of the Washington *Shared Parenting Act* suggests that this call for caution is well founded. The study concluded that "[l]ongitudinal research about the experiences of families who divorce under the new Act is imperative before a reasoned judgment of this law can be made. Other jurisdictions should therefore hesitate to impose the demanding plan requirement on divorcing parents and should, at most, recommend that parents may wish to use that structure in their decrees."⁴⁷

The Australian legislation is also still very new, and there has not yet been opportunity to evaluate its effects. Some of the commentary that has begun to emerge on the legislation has raised a host of questions about the new parenting

⁴⁵ Bala and Miklas, *supra* note 5.

⁴⁶ Boyd, *supra* note 13 at 354.

⁴⁷ Ellis *supra* note 35 at 181.

responsibility approach, the parenting orders, and parenting plans.⁴⁸ For example, the Honourable Peter Nygh has observed that despite the many changes contained in the *Family Law Reform Act 1995*, "much will depend on the approach taken to the Reform Act by judges and practitioners. The revolution may be more apparent than real."⁴⁹ Nygh notes that although "residence" may be simpler to explain under the new *Act*, "the nature of 'parental responsibility' will be an uncertain quantity, even to lawyers. Read literally, it can justify the interventionist non-residential parent, usually dad, to make unilateral decisions about medical and educational issues. This may mean that practitioners should seek further specific issues orders specifying the range of authority for the "residence provided" ranging from a daily care and control order to specific allocation of authority over educational, dietary, religious and medical matters. Similar care would have to be taken in the drafting of consent orders and parenting plans. In that case the new law will not be more simple and less divisive, but quite the reverse."⁵⁰

There is little other documented evidence of the impact of shared parenting on divorcing couples and their children. At a minimum, in the absence of this empirical data, we would be wise to remain cautious about shared parenting, parenting orders and parenting plans. Further, the concerns raised in relation to the Australian legislation suggest that there are many issues that remain very uncertain. In particular, it is not clear that the legislation will meet one of its most basic objectives of simplifying the resolution of child custody disputes upon

⁴⁸ See *supra* note 30 which focuses on this new legislation. Many of the articles raise potential problems and uncertainties that have been created by the law, and that remain unanswered.

⁴⁹ Nygh, *supra* note 43.

⁵⁰ *Ibid.* at 16.

marital breakdown.

Shared parenting arrangements *might* work well for many separating families, where couples have shown an ability and willingness to work together despite their differences. But, there is little to suggest that shared parenting would be helpful or even feasible for high conflict families. And there is considerable evidence to suggest that an approach that emphasizes the continued involvement of both parents in such high conflict families in decision making regarding the child may be harmful. High conflict divorcing parents have a poor prognosis for developing the kind of cooperative parenting that is required for shared parenting.⁵¹

On the one hand, this observation might suggest that any legislated list of criteria for when shared parenting is inappropriate would need to be more extensive than that contained within either the *Washington Act* or the *Australian Act*. For example, the legislative framework could specify that shared decision making is not appropriate for high conflict families. Alternative principles would have to be included to guide the resolution of child custody disputes in these families.

On the other hand, this observation may in fact lead to the conclusion that a shared parenting approach is unlikely to affect significantly the resolution of child custody disputes. Under the existing substantive and procedural framework of child custody, most divorcing and separating couples do settle their disputes. Only the most conflictual and litigious actually proceed to court. A shared parenting approach may do little to affect this general trend: most couples will settle their disputes, and the high conflict couples will proceed to court.

There are other criticisms of this shift to shared

⁵¹ Janet Johnston, *High Conflict and Violent Parents in Family Court: Findings on Children's Adjustment and Proposed Guidelines for the Resolution of Custody and Visitation Disputes* (San Francisco: Judicial Council, 1992); See also Johnson, *supra* note 26.

parenting and parenting orders that need to be considered. Some commentators have been critical of the formal equality that informs the shared parenting approach. For example, in the Australian context, Juliet Behrens has argued that "the notion of joint parental responsibility . . . does not take sufficient account of the fact that it is women who are usually the primary caregivers of children and that they are, therefore differently situated from men."⁵² This observation is one that returns to the basic point that child care during marriage remains a highly gendered activity, not one characterized by formal equality. In many ways, this critique directly parallels the criticisms of the earlier popularity of a presumption in favour of joint custody – an approach to child custody that was debated but not ultimately accepted in the Canadian context.⁵³

Questions:

- Should Canadian child custody law move towards a shared parenting approach?
- If so, what limitations on shared parenting should be expressly included within the statute?
- Should parenting responsibility be defined in the

⁵² Juliet Behrens, "Ending the Silence, But. . . Family violence under the Family Law Reform Act 1995" (1996) 10 Australian Journal of Family Law 35, at 40. See also M. Troup "The Family Law Reform Bill No 2 and its Ramifications for Women and Children" (1995) 5 Australian Feminist Law Journal 111.

⁵³ The criticism of the move towards formal equality in child custody can be seen generally in the work of Martha Fineman, *The Illusion of Equality* (Chicago: The University of Chicago Press, 1991); Carol Smart and Selma Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (London: Routledge, 1989); Carol Smart, "The Legal and Moral Ordering of Child Custody" (1991) 18 J. of L. and Society 485; and Susan Boyd, *supra* notes 12, 13 and 14.

legislation, and if so, how?

- Should the scheme of parenting orders be adopted?
- If so, is the Australian scheme of residential orders, contact orders, specific parental responsibilities, and maintenance orders – the appropriate one?
- Should there be more specific orders made in relation to decision making authority?
- On what basis/criteria should parenting orders be determined?
- Should a primary caregiver rule be used to determine the child's residence?
- How could a scheme of parenting responsibilities address the criticisms that it simply confers more decision making authority and control on the non-residential parent?
- Should the Canadian legislation embrace the concept of parenting plans?
- Should these plans be made mandatory as in the Washington context, or simply encouraged as one way of resolving parenting post-divorce?
- What should the role of the Court be in relation to these plans?
- What criteria should be used in reviewing these plans?

III. INCORPORATING THE NEED FOR CERTAINTY AND THE DESIRE TO MINIMIZE FUTURE LITIGATION

The tension between the need for legislative flexibility and predictability of outcome has long haunted efforts to reform family law in general, and child custody law in particular. The tension, and divided opinion, is reflected in the recent decision of the Supreme Court of Canada in *Gordon v. Goertz*.⁵⁴ Madam

⁵⁴ *Gordon v. Goertz supra* note 29 .

Justice McLachlin, writing for the majority, emphasized that each case of child custody and access must be determined according to the best interests of the child, and must turn on its own unique circumstances. Madam Justice L'Heureux-Dubé, in a separate opinion, expressed her preference for presumptions (specifically for a presumption in favour of the custodial parent's decision making authority) which could produce greater certainty and predictability, and thus, less litigation and ongoing parental conflict.

Promoting predictability and certainty in post-divorce parenting arrangements, by minimizing or at least constraining the opportunities for litigation, would be an important component of a child-centred approach. Predictability of outcome could help reduce the extent to which child custody or access disputes are used as emotional weapons between separating and divorcing parents, and the extent to which children become pawns within these struggles.

The need for certainty and the desire to minimize future litigation requires some statutory principles to guide decision making about parent-child relationships upon marital breakdown. This requirement of certainty can be justified both on the grounds of policy and as being compatible with the needs of children. Presumptions can operate to increase predictability of outcome, and thereby reduce litigation and ongoing parental conflict. And any reduction in conflict will be in the best interests of children. At the same time, these presumptions need not be seen as replacing judicial discretion, but simply as operating as rebuttable presumptions which should be given significant, but not always, determinative weight.

The way in which a presumption would operate in law would, of course, depend on the regulatory framework adopted. One option would be to adopt a primary caregiver presumption, which would award custody to the parent who had successfully undertaken the primary role of caring for the child throughout the marriage. Alternatively, within a revised regulatory framework that adopted a shared parenting responsibility approach, a primary caregiver presumption could operate in

relation to the child's residence, and/or decision making authority.

In the sections that follow, we raise a number of other specific presumptions that could be adopted in relation to child custody and access disputes. The more general question for discussion here is whether the law of custody and access should be reformed to include legal presumptions.

Questions:

- Is it possible to move beyond this traditional understanding of the tensions between legal rules and judicial discretion?
- For example, is it possible to develop a series of presumptions that could help limit the occasion for litigation by focusing on the needs of the children?
- Instead of dichotomizing rules/discretion, is it possible to develop a process that could progressively narrow the range of issues under dispute?
- Should the legislative framework specify presumptions?

IV. DEVELOPING A GENERAL POLICY ENCOURAGING OPTIMAL PARENT CONTACT

One of the objectives of child custody law put forward by the Department of Justice in its 1993 discussion paper is that where former spouses have demonstrated that they are capable of working together, maximizing contact between the child and both parents should be encouraged. Arguably, this objective is supported by some recent social science research and individuals working in the area of child development and psychology. Rhonda Freeman, for example, states that there is a need to value the role and contribution of both parents in a child's life, and Gary Austin notes that, usually, both parents are competent to parent post-separation if their grief and pain is

managed and contained.⁵⁵ While these commentators acknowledge, in general, the child's need and each parent's ability to maintain a parenting relationship post-separation, neither states that maximizing parental contact, even where parents are able to cooperate, should be a stated goal of custody law. Prior to endorsing the objective of maximizing contact as central to a legal regime of custody law, it seems sensible to determine what is meant by "maximizing" and "contact" and the implications of this objective for the development of legal rules, processes and principles relating to parenting post-divorce.

Currently, sections 16(10) and 17(9) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), provide that children should have as much contact with each parent as is consistent with their best interests and that courts should consider the willingness of the individual seeking custody to facilitate such contact. These provisions, commonly referred to as "the friendly parent rules," reflect a general assumption that the needs and interests of children post-divorce will usually be best met when the child maintains significant contact with both parents following divorce. Moreover, the legislation has been interpreted by many as sending a signal to parents, that determinations about the custodial parent will be highly affected by each parent's respective willingness to facilitate contact with the other parent. The friendly parent rules have been criticized most often on the grounds that "they have presented problems for mothers who fear abuse by their spouses of themselves or their children, or are hesitant about joint custody arrangements."⁵⁶ Such parents may be afraid to raise concerns due to the possibility of being viewed as an "unfriendly parent" and "forfeiting their chance at obtaining custody."⁵⁷ An additional, but related, critique of the

⁵⁵ Freeman, *supra* note 23 and Austin, *supra* note 7.

⁵⁶ Boyd, *supra* note 13, at 336.

⁵⁷ *Ibid.*

friendly parent rules is that they skew the litigation or the negotiation process by increasing the pressure on a parent to demonstrate willingness to facilitate access as a factor in a custody dispute.

Beginning with the presumption that continuing contact with psychologically significant adults generally promotes the welfare of children following parental separation, Bala and Miklas recommend that:

There should be a presumption that it is in the best interests of the children to have frequent and predictable contact with both parents, on a schedule that accords with the child's developmental needs, unless it can be demonstrated that such involvement poses a significant risk to the child's physical or emotional well-being.

A continued relationship with both parents should, in some senses, be seen as a child's right, in that the parent with whom the child has primary residence has an obligation to facilitate involvement with the other parent, unless visitation rights are suspended. The parent with whom the child does not have primary residence should also be viewed as having an obligation to continue to be significantly involved with the child, though this is not an obligation that is legally enforceable. Such involvement is likely to be encouraged by recognizing the concept of "parenthood," and involving both parents in some way in decision-making.⁵⁸

Bala and Miklas argue that this recommendation, while in some

⁵⁸ Bala and Miklas, *supra* note 5 at 135.

respects similar to the “friendly parent presumption,” will less likely skew the litigation and negotiation process as it reduces the pressure on a parent to demonstrate willingness to facilitate access as a factor in a custody dispute. Their recommendation does nothing however to address the gendered inequities which his recommendation would perpetuate in the majority of cases. As has been widely noted, women are, and will likely continue to be the primary care givers, the custodial parent or the primary residential parent in the vast majority of cases. Imposing a legally enforceable obligation on them to facilitate the child’s involvement with the other parent, at the same time that no obligation is imposed on the other parent to honour their responsibilities of parenting is unfair. Not only does this recommendation impose the “work” of sustaining access or involvement entirely on the primary care giver, it creates an invidious situation in which only the so called failure of the primary care giver to honour the child’s needs is sanctioned. Surely if a policy of supporting maximum involvement between the child and both parents exists to best fulfill the needs of the child, non-residential parents who fail to honour their parenting responsibilities of involvement should be sanctioned as well.

It is also important to question whether this principle of maximum contact is always in the best interest of children. As we discuss in further detail below, in the context of high conflict families and violent or abusive families, maximum contact will be highly inappropriate. Children from violent or high conflict families will not benefit from maximum contact with the non-residential parent. Rather, efforts at contact may only aggravate the conflict between the parents, and in turn create a highly unstable and damaging environment for the child. These types of families raise a question about whether maximum contact is in fact the right principle, or whether some other principle, like optimal contact may be more flexible and appropriate.

Questions:

- How, if at all, should the principle of facilitating contact with the non-residential parent be included in the legislation?
- Can the principle of contact be framed in a way to avoid the problems that have been identified with the friendly parent rule?
- To what extent may it be useful to distinguish between maximum and optimal contact?
- To what extent would the principle of optimal contact be better able to deal with the variety of familial contexts, particularly those involving high conflict families where maximum contact may not be in the best interests of children?
- Is it possible to make distinctions in the regulatory framework between the families where contact is appropriate, and those where it is not?
- Is it possible to embrace the principle of maximum or optimal contact in a way that does ensure that contact is not ordered when it is not the child's best interests?

V. DEVELOPING AN APPROACH TO DEAL WITH HIGH CONFLICT FAMILIES

A number of authors have suggested that the legal system must recognize that there are different types of parental separations, requiring different kinds of responses. One situation that has been singled out in the psychological literature as requiring a particular legal response is that which has been identified as high conflict. Increasingly, the literature has identified distinctions between high and low conflict families.⁵⁹ Many of

⁵⁹ The literature in fact identifies a range of families on a spectrum from high to low. Different authors have offered different typologies of families. However, the category of high conflict –

these high conflict families are also families in which there has been domestic violence or abuse, and as we argue in the next section below, for whom a different set of rules must be applied. But, other of these high conflict families have not necessarily experienced violence, but may nevertheless require a very different approach. The general objective of encouraging maximum parental contact in the context of high conflict families may be inappropriate. Janet Johnson's recent work has suggested that there is a poor prognosis for high conflict parents to develop cooperative parenting approaches.⁶⁰ These parents cannot, and should not be expected to, cooperate to the extent required for shared parenting, or other similar post-divorce parenting arrangements that require considerable communication and shared decision making. Both a principle of maximum contact, and a shared parenting approach would then be inappropriate. There is also very serious reason to question the ability and even desirability of these couples attempting to negotiate a parenting plan. The question that therefore arises is what alternative could be used to resolve these disputes?

This issue of high conflict families raises the broader question of which kinds of divorcing parents the legal regulation of child custody and access should be premised upon. Should the law attempt to provide guidance, and establish the framework within which reasonably low conflict divorcing couples can sort out their affairs? Or should the law address high conflict divorcing couples who are unable to agree on virtually anything? And to what extent will it be possible to develop a regulatory framework that can do both? Both sets of parents require some legal intervention or guidance – although

of those families that are characterized by intense conflict and a virtual breakdown in ability to communicate, let alone cooperate, is increasingly common. See for example Rhonda Freeman, *supra* note 23.

⁶⁰ Johnson, *supra* notes 26 and 51.

the degree of that intervention will vary enormously. Moreover, as others have observed, many divorcing couples fall into a range of categories somewhere in between high and low conflict. How, if at all, can a regulatory framework recognize the need to assess the degree of conflict that characterizes different families, and divert different families to different rules, procedures and/or protocols?

Questions:

This issue raises a much broader challenge for the reform of child custody law.

- Can a legislative framework be designed that can take account of the very different needs of families with different degrees of conflict?
- Is there a principled basis upon which to distinguish between high and low conflict families?
- Can some typography be developed to assist legal and other professionals deal with the different needs of families with different conflict levels?
- If so, can/should this typography be integrated into the legislative framework?
- Can principles or guidelines be incorporated in the legislative framework to deal specifically with the problems of high conflict families?
- Who will make the determination of whether a particular relationship is high conflict or not?

VI. DEVELOPING AN APPROACH TO PROTECT WOMEN AND CHILDREN FROM ABUSE

Issues of violence and abuse against women and children must be specifically addressed within any new approach to child custody. The child development literature has increasingly documented the negative impact on children not only of violence and abuse directed against them, but also of exposure

to interparental violence and abuse.⁶¹ The *Divorce Act* does not currently specify that violence against women or children be taken into account. Section 16(9) provides that "the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as parent of a child." Although a history of child sexual abuse or physical abuse (if considered credible, which raises its own set of issues discussed below) would obviously be relevant to the ability of a person to act as a parent, the question of whether spousal violence would affect the ability of a person to act as a parent has been more controversial. There are a number of cases where the courts have held that spousal violence is a factor that ought to be taken into account.⁶² But, the case law is not entirely consistent on this point,⁶³ and the legislation could and should provide much more specific guidance on the relevance of violence and abuse.

There are a number of ways that presumptions could be built into the legislation, depending on the particular nature of the new legislative regime. One approach is provided by the Newfoundland *Children's Law Act*.⁶⁴ Section 31(3) provides:

(3) In assessing a person's ability to act as a parent, the court shall consider whether the person has ever acted in a violent manner towards

⁶¹ See Freeman, *supra* note 23; See also P. Jaffe, D. Wolfe and S. Wilson, *Children of Battered Women* (Newbury Park: Sage, 1990).

⁶² See for example *Young v. Young* (1989), 19 R.F.L. (3d) 227 (Ont. H.C.); *Renaud v. Renaud* (1989), 222 R.F.L. (3d) 366 (Ont. Dist. Ct.).

⁶³ See for example *Allen v. Allen*, [1995] S.J. 410 (QL) (Q.B. (Fam. Div.)).

⁶⁴ R.S.N. 1990, c. C-13.

- (a) his or her spouse or child;
- (b) his or her child's parent; or
- (c) another member of the household

otherwise a person's past conduct shall only be considered if the court thinks it is relevant to the person's ability to act as a parent.

This approach has the advantage over the *Divorce Act* by at least specifying that violence *should* be taken into account. It does not, however, specify *how* that violence should be taken into account.

Other jurisdictions that have adopted a shared parenting approach have taken a number of different approaches to the issue of violence. For example, the Ohio legislation provides that any history of, or potential for, child abuse, spousal abuse or other domestic violence is a factor that the courts should take into account in determining whether shared parenting is appropriate. The Washington *Shared Parenting Act of 1987*, by way of contrast, provides that shared parental decision making is not appropriate where a parent has been found to have engaged in physical, sexual or emotional abuse of the child. In the former, violence is but one of a number of factors to be considered in deciding whether shared parenting is appropriate. In the latter, violence effectively precludes shared parenting. However, it also should be noted that in the Ohio legislation, violence includes child and spousal abuse, whereas in the Washington legislation it is child abuse alone that is relevant.

In Australia, the *Family Law Reform Act 1995* recognizes violence as a factor to be taken into account in determining the best interests of the child. Section 68F(2)(g) provides that the Court must consider "the need to protect the child from physical or psychological harm caused, or that may be caused by: (i) being subjected or exposed to abuse, ill-

treatment, violence or other behaviour; or (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.”⁶⁵ Violence, as a factor in determining the best interest of the child, is then a factor for the courts to consider in making a parenting order under the *Act*.⁶⁶ Section 68K further requires the court to consider the risk of family violence in determining what parenting order to make. The section provides that “in considering what order to make, the court must, to the extent that it is possible to do so consistently with the child’s best interests being the paramount consideration, ensure that the order is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence.” However, according to this section, although violence is an important factor, if in the court’s view, it is in the child’s best interest to do so, the court may make an order that is inconsistent with a family violence order. Section 68R requires a clear explanation of various matters where a contact order is made which is inconsistent with a family violence order.

The Australian legislation is somewhat more expansive in its consideration of violence than either the Ohio or Washington state legislation. It is an important improvement in specifically recognizing the negative impact on children of violence directed towards another person. However, concerns have been expressed about whether this legislation has gone far enough to protect women and children from violence. Some commentators have criticized the extent to which “women’s

⁶⁵ Section 68F(g), *Family Law Reform Act 1995* (Cth).

⁶⁶ This provision is one among a number of provisions in the *Act* that attempts to address the issue of domestic violence. For example, section 43 of the *Family Law Reform Act 1995*, which contains the general principles which the Family Court is to consider in the exercise of its jurisdiction now includes “the need to ensure safety from family violence.”

safety continues to be subject to individual judge's determinations of what is in a child's best interests.⁶⁷

In our view, violence should not simply be one factor among many to be considered in determining whether shared parenting is appropriate. We do not believe that this is sufficient protection. Rather, a history of child abuse or spousal abuse ought to create a *presumption* in favour of the non-abusive parent.⁶⁸ If a shared parenting approach was adopted, the legislation would need to specify that shared parenting would not be appropriate in the context of families with a history of violence. To the extent that the shared parenting scheme applies specifically to decision making authority, the legislation should make clear that such shared decision making authority is not appropriate in circumstances of child and spousal abuse. Decision making authority should rest with the residential parent.

⁶⁷ Behrens, *supra* note 52 at 42-43. Behrens argues that women should not have to argue for their safety entirely within the framework of the best interests of the child test. Along similar lines, in "Inequality, Power and Control: Relevance to Domestic Violence Responses in the ACT and to the Family Law Reform Bill," paper presented to the First Annual Forum on Justice for Women, organized by the National Women's Justice Coalition, Canberra, March 13, 1993 at 12, as cited in Behrens, *ibid.* at 39-40, Harrison and Behrens argue "While the best interests of the child must be a child-centred test, it is submitted that the inextricable link between the well being of the child and the custodial mother, requires a recognition of the realities and interests of the custodial mother. Promoting women's substantive equality is fundamental to the well-being of women and the children in their care. Accordingly, it is submitted that the concept of the best interests of the child should be interpreted in a manner consistent with the constitutional goals of promoting women's substantive equality."

⁶⁸ See Maccoby and Mnookin, *supra* note 10.

Regardless of the particular legislative scheme to be adopted, the preferred approach to violence would be to specify that the general principles/rules would not apply in situations of abuse, and to include a presumption in favour of awarding custody to the non-abusive parent. Further, the presumption should specify that unsupervised access be severely limited or denied.

A. Evidentiary Requirements for Abuse Allegations

It has become commonplace in the media and in a considerable amount of the child custody literature to assert that there is a serious problem of false abuse allegations.⁶⁹ There is very little empirical data to sustain the claim, and in fact, empirical studies suggest that false allegations of child abuse are rare.⁷⁰ The mere

⁶⁹ See for example Nicholas Bala and Anweiler, "Allegations of Sexual Abuse in a Parental Custody Dispute: Smokescreen or Fire?" (1987/88) 2 Canadian Family Law Quarterly 343 who suggest that while few allegations of child sexual abuse are false, there is a much greater chance that an allegation is false when it is made within the context of a parental separation. See also Nicholas Bala, "Spousal Abuse and Children of Divorce: A Differentiated Approach" (1996) 13 Can. J. of Fam. L. 215 at 244-249. At 245-6, Bala writes "with more awareness among the public, and a much higher degree of psychological validation and support than in the past, it is quite possible that there may now be more false or exaggerated claims of spousal abuse than in the past, as well as more genuine victims coming forward." Yet such claims about the increase in false or exaggerated claims are virtually without any supporting empirical data. For a recent example of the media perpetuating, without any empirical basis, the idea of false abuse allegations, see Donna LaFramboise, "Oh Dad, poor Dad" *The Globe and Mail* (12 April 1997).

⁷⁰ See Susan Penfold, "Questionable Assumptions About Child Sexual Abuse Allegations During Custody Disputes" (1997) Can. J. of Fam. L. 11.

belief that there are serious problems of false abuse allegations, however, has made it increasingly difficult for women to have issues of abuse taken seriously within the context of child custody disputes.

Recognizing violence and abuse within the legislative scheme would be an important advancement. But, there is, at the same time, reason to be concerned that the creation of a different set of presumptions for violence may only exacerbate the credibility problems that women are already facing when they make allegations of abuse. Establishing a different presumption for cases involving violence could reinforce the already too prevalent belief that women are only making allegations as a ploy to win custody. Women may be seen to be making "false allegations" simply to be able to access these presumptions. As a result, the threshold for accessing these presumptions may become unduly high, and effectively unattainable for most women.⁷¹ Without some attention to the existing problems of credibility, the creation of a presumption regarding violence may be an empty promise.

Further, there is a recent trend in some popular as well as academic literature which has tried to emphasize that women also commit spousal abuse.⁷² Although isolated cases no doubt exist, there is simply no evidence that domestic violence is a gender neutral problem. It remains a deeply gendered problem – on the whole, women are abused by men, and not the other way around. Nevertheless, increasingly, domestic violence is being reframed through a lens of formal equality and gender neutrality. In fact, zero tolerance policies have led to women being charged and counter-charged with assaulting their

⁷¹ It is this very reason that some commentators have argued in favour of a primary caregiver rule: see Boyd, "Rethinking the Rethinking of Decisions about Children, Or, The Disappearing Feminist" in Bala and Miklas, *supra* note 5.

⁷² See Bala and Miklas, *supra* note 5.

spouses.⁷³ It is important to consider the possible implications of this troubling trend for any effort to legislate in the area of domestic violence, and to consider how the rules might be turned against the very individuals that the rules are intended to protect.

Questions:

- What rules, presumptions and/or protocols need to be put into place to deal with issues of custody/access in families that have experienced violence and abuse?
- How can the legislative framework ensure that victims of violence are adequately protected?

VII. REFORMING THE PROCESS

The final objective listed in the Discussion Paper is the need to recognize the reality that most parenting arrangements after separation and divorce are worked out without the need for court interventions. In this final section, we look at some of the recent developments and debates in the process of resolving family, and particularly, child custody disputes, that attempt to facilitate such out of court settlements.

⁷³ See Dianne Martin and Janet Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995) 8 C.J.W.L. 3.

A. Parenting Education⁷⁴

The Department of Justice Discussion Paper suggests that parenting education courses might offer some promises for more effective resolution of parenting disputes. Parenting education, intended to inform parents about their children's needs during and after divorce, might help parents examine and alter their behaviour.⁷⁵ Parenting education programs can take many forms, ranging from information dissemination to skills training, although commentators suggest that the most effective programs are video-based, skills oriented courses.⁷⁶

A number of Canadian jurisdictions have begun to experiment with parenting education. For example, a parenting education course was introduced in Manitoba by the Minister of Family Services in 1995.⁷⁷ The program is a three hour session available to all separating and divorcing parents, focusing on the impact of divorce on children and their parents. The first evaluation report of the program found that participants

⁷⁴ The research for the discussion of parenting education was conducted in conjunction with a study by Brenda Cossman and Carol Rogerson on legal aid in family prepared for the Ontario Legal Aid Review. For a more detailed discussion of this research on parenting education, see Cossman and Rogerson, "Case Study in the Provision of Legal Aid: Family Law" in A Blueprint for Publically Funded Legal Services (Ontario) 1997 Volume 3 at 903-909.

⁷⁵ Department of Justice, Discussion Paper, *supra* note 1 at 27.

⁷⁶ Jack Arbuthnot, Donald Gordon, and the Centre for Divorce Education, "Divorce Education for Parents and Children" in L. Vandecreek, ed., *Innovations in Clinical Practice: A Source Book*, Vol. 15 (Sarasota, FL: Professional Resources Press, 1996).

⁷⁷ See Manitoba Civil Justice Review Task Force Report at 15-16.

expressed a high satisfaction rate with the program. The findings also indicate the need for early intervention: recently separated individuals viewed the program as more helpful than individuals who have been separated for more than six months.⁷⁸

Alberta has been offering two hour voluntary parenting education courses since 1993. In 1996, a mandatory pilot project was introduced in Edmonton. Any parent living within 80 kilometres of Edmonton who wished to bring an application before the Court of Queen's Bench in a divorce action on a question of child support, custody or access was required to attend an educational seminar entitled "Parenting after Separation." During the six month trial period, the seminar was conducted for six hours, and held weekly two nights a week. The course evaluations by the participants were very positive. At the conclusion of the trial period, it was recommended that the course be implemented in every judicial district, and that attendance be made mandatory for all divorcing parents. Exemptions to the program were minimal – parties seeking interim custody incidental to an ex parte restraining order in cases of domestic violence, kidnapping and unilateral changes in de facto custody do not have to attend the course before seeking an order. However, attendance was recommended within two months of any order granted.

A number of issues and concerns that have been raised about parenting education need to be further explored and addressed. One of the most significant issues that must be addressed is in relation to the scope and content of the parenting education courses. These courses need to be differentiated from marriage counselling. Parenting education courses should address the range of legal, social, economic and emotional issues that parents and their children face on divorce. Unlike marriage counselling, these courses should not have as their primary objective preventing the divorce, and keeping the

⁷⁸ *Ibid.* at 16.

family unit intact. Rather, to be effective, these courses would need to begin from the assumption that the couple have decided to divorce.

There are also related concerns about the precise content and biases of these courses. Studies of parenting education in the US show that the majority of programs tend to emphasize the problems that divorce can cause for children, and focus on what parents can do to minimize these problems. The programs vary considerably in terms of whether the programs are primarily information giving sessions, or whether they also integrate skills building (such as teaching parents new skills and behaviors in communication, cooperation and conflict resolution). The programs also vary in terms of addressing a broad range of issues, such as parenting plans, resources available in the community, domestic violence, information of the family justice system, and alternative dispute resolution mechanisms that might be available.⁷⁹ It will also be important to address the question who will be considered qualified to conduct these parenting education courses. The US studies suggest that most programs are conducted by parties with advanced degrees, with some specialized training in divorce education. If parenting education programs are to be integrated into the process of divorce, it will be important to standardize the qualifications of these educators, as well as the content of these courses.

A second issue that will need to be discussed is whether parenting education programs should be available on a voluntary or mandatory basis. In the US studies, most programs have been found to be mandatory. Attendance at these mandatory programs is often required for parents who have filed their initial divorce petitions, although attendance is rarely enforced with serious sanctions.⁸⁰ The primary reason that most

⁷⁹ Arbuthnot et al., *supra* note 76 at 18-9.

⁸⁰ *Ibid.*

programs have been made mandatory is the belief that absent such a requirement, parents will not attend. Some studies have suggested that parents most likely to attend voluntary programs are those parents who are "likely to be the most motivated and child-centred, and therefore may be those who need the program the least. They are also likely to be more affluent and better educated." If the programs were to be made mandatory, consideration would need to be given to the question of exemptions. For example, it would be inappropriate for women and children who have experienced violence and abuse to participate in a program that is intended to promote better cooperation and shared parenting after divorce.

A third consideration is the question of the cost of these educational programs, and whether the programs will be publicly or privately funded. In Canada, the cost of the pilot programs in Canada discussed above range from \$30 to \$100, to be paid by the participants. The cost of some privately available programs is considerably higher. If these programs are to be made mandatory for separating and divorcing parents, the additional cost for low income families is not insignificant. Some consideration needs to be given to subsidizing the costs of these programs for low income families. Legal aid programs might considering funding the costs of the programs. However, the insufficient funding to family law that has long characterized legal aid programs across the country is only intensified under the current period of fiscal restraint and funding cutbacks. Some public funding alternative needs to be provided.

Questions:

- Should parenting education programs be included in the legislative framework of child custody and access, and if so, how?
- Should these programs be made mandatory for separating and divorcing parents?

B. Alternative Dispute Resolution Mechanisms

The vast majority of family law disputes are resolved without court intervention, through various forms of dispute resolution – mediation, negotiation, and/or settlement conferences that deploy a range of mediation techniques. Although in many quarters, ADR in general and mediation in particular is increasingly advocated as a response to family law disputes, others continue to caution that alternative dispute resolution has serious limitations, and that it does not represent a panacea to the problems of family law. And despite its increasing popularity – particularly in terms of the highly questionable belief that it may result in significant cost savings in the resolution of family law disputes⁸¹ – studies have time and again concluded that mediation should not be made mandatory in the context of family law.⁸² Alternative dispute resolution mechanisms thus remain controversial within the realm of

⁸¹ For example, a recent study – J.S. Kakalik et al. *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* (RAND Civil Justice Institute, 1996) – has challenged at least some of the assumptions about the benefits of ADR. The five year study for the U.S. federal *Civil Justice Reform Act of 1990* concluded that the referral of cases to non-binding alternative dispute resolution, such as mediation, neutral evaluation or arbitration as a supplement to the normal court processes, has had little effect on cost and delay. Rather, the study found that participants in ADR seemed to be slightly more satisfied with the results, and that ADR cases were more likely to have a monetary outcome.

⁸² See for example the Ontario *Civil Justice Review Supplemental and Final Report* (Toronto: Ontario Court of Justice and Ministry of Attorney General, November 1996), and the Ontario *Attorney General's Special Advisory Committee on Mediation in Family Law* (Ontario, February 1989).

family law.⁸³ Serious concerns have been expressed about whether the power differentials that often characterize family law disputes can be appropriately addressed within mediation or other forms of ADR. Further, there are questions about the inappropriateness of mediation where there has been a history of spousal violence or abuse. Women who have experienced domestic violence or abuse will not have an equality of bargaining power in the mediation process, and such women may agree to forfeit a range of their legal entitlements simply to avoid further confrontation with their batterers. As a result, women will often have less bargaining power, and may forfeit their legal entitlements to avoid confrontation, and/or ensure custody of their children.

At least some of these concerns about the role of mediation in family law have been recognized in government studies, reviews and task forces. For example, in Ontario, the *Attorney General's Advisory Committee on Mediation in Family Law*, February 1989 concluded that mediation should be voluntary.⁸⁴ The Advisory Committee recommended that it should be offered for any or all family issues except family violence. The Committee emphasized that the issue of whether acts of violence occurred should never be mediated. Mediation is not appropriate where one of the parties is a victim of domestic violence. The Ontario *Civil Justice Review* similarly concluded that mediation should be available, but not

⁸³ See for example Martha Bailey, "Unpacking the 'Rationale Alternative': A Critical Review of Family Mediation Movement Claims" (1988), 8 Can. J. Fam. L. 61; Elizabeth Pickett, "Familial Ideology, Family Law and Mediation: Law Casts More Than a Shadow"(1991), 3 J. of Human Justice 27; N. Zoe Hilton, "Mediating Wife Abuse: Battered Women and the 'New Family' " (1991) 9 Can. J. Fam. L. 29.

⁸⁴ *Supra* note 82.

mandatory in family law disputes.⁸⁵

Nevertheless, it remains important to try to rethink the ways in which family disputes, and child custody disputes in particular, are resolved. Child custody issues need to be resolved in a timely fashion. And a procedure that attempts to minimize conflict will be preferable to procedures that accentuate the conflict between separating and divorcing parents. At the same time, some separating and divorcing couples are high conflict, and there is at least some question as to whether any dispute resolution mechanism short of judicial intervention will be able to resolve their child custody and access disputes. Moreover, it is in these high conflict disputes that children may be most in need of protection. Once again, the

⁸⁵ Ontario *Civil Justice Review, Final Report*, *supra* note 82 at 81. Some of these concerns have been taken into account in the development of Court mediation models in other jurisdictions. In Australia, Order 25A Rule 5 of the *Family Law Act* directs mediators, in determining whether a dispute can be mediated, to take into account "(a) the degree of equality (or otherwise) in the bargaining power of the parties; and (b) the risk of child abuse (if any) and (c) the risk of family violence (if any) and (d) the emotional and psychological state of the parties." Although some commentators are critical of the failure of the *Act* itself to deal specifically with the issue of violence and mediation (see Behrens *supra* note 52), others have noted that in practice pursuant to this order, Family Court mediators do not offer mediation "to clients where violence is currently a feature of the relationship of where a manifestly unequal power relationship exists between the couple." Hon. Chief Justice Alastair Nicholson, "Mediation in the Family Court of Australia" (1994) 32 *Fam. and Concil. Crts. Rev.* 138 at 143. For a discussion of mediation protocols that attempt to screen participants for violence and abuse, see generally Barbara Landau, "The Toronto Forum on Women Abuse: The Process and the Outcome" (1995) 33 *Fam. and Concil. Crts. Rev.* 63. See also Barbara Landau, Mario Bartoletti, Ruth Mesbur, *Family Mediation Handbook*, 2nd ed. (Toronto: Butterworths, 1997).

problem arises of the enormous differences between high conflict families and lower conflict families, and how a legal regime can be framed to adequately take the problems and challenges of both into account.

Increasingly, there is discussion about reforming the procedure of family law to stream cases into the appropriate forums for dispute resolution. There is discussion of diverting parties first into parenting education courses, and then, as appropriate, into mediation. More attention is being given to the difficult question of how cases should be streamed – how individuals should be directed to the appropriate forum(s) for the resolution of their family law disputes. How can a regulatory framework ensure on the one hand that reasonably low conflict families are streamed into forums that encourage the parties to reach their own agreements, while also ensuring that high conflict families provide the higher level of judicial intervention that is likely required for the resolution of their disputes?

As we have discussed above, some jurisdictions now encourage separating and divorcing parents to reach their own agreements, often with minimal judicial supervision, through parenting plans. Parenting plans may be a useful device for some families. But, many families are less likely to be able to cooperate to the degree necessary to reach a satisfactory parenting plan. And encouraging private agreements, at all costs, may only operate to reinforce the vulnerability of the weaker parties - usually, the women and children.

Further, in many jurisdictions, parenting plans must specify how ongoing disputes are to be resolved. Parents who are able to cooperate to a sufficient degree to negotiate a parenting plan can specify how disputes that arise from time to time were to be resolved. The Washington State *Parenting Act* provides that a parenting plan must include such a dispute resolution provision. A study of the early experience with the statute found that 57% of divorcing parents specified mediation to resolve their disputes, and 16% specified court intervention. Mediation might be a satisfactory way to resolve the disputes of those parents who are able to cooperate to a sufficient degree to

negotiate a parenting plan in the first place (assuming that the parenting plan is not mandatory). But, high conflict couples are, by definition, unable to cooperate to the extent required for negotiating a plan, for the exercise of shared parenting responsibilities, or for mediation. The question again is what provisions need to be made for those divorcing parents whose relationships are characterized by such a high degree of conflict?

Another suggestion has been to increase the use of arbitration. Arbitration has not been used to any significant extent within resolution of family law disputes. Some have suggested that parenting arbitration could be successfully used to resolve the on-going disputes that arise in the context of shared parenting and parenting plans.⁸⁶ Rather than returning to court every time a dispute arises, the parties could turn to a designated arbitrator who could resolve the dispute.

Arbitration may be a useful, and under-used, approach to the resolution of on-going disputes regarding custody and access. It may be a particularly helpful approach to the resolution of the various micro-issues that arise in relation to access or contact orders. However, there is again reason to be concerned as to whether it can adequately address the problems of high conflict families, as well as those families that have experienced violence. In high conflict families, there may be no way around the need for judicial intervention. It may be that the Court is required to set boundaries, and authoritatively resolve the dispute between the parties. Similarly, in families with domestic violence and abuse, the Court may be required to prevent any further exploitation and marginalization of the vulnerable parties. This is not to suggest that high conflict families may not be able to benefit from some other forms of intervention, from parenting education to counselling. But, it

⁸⁶ In the Washington study, only 2% of the parents interviewed specified arbitration as their form of dispute resolution. See Ellis, *supra* note 35.

may also be the case that in many of these high conflict families, it will be difficult to avoid or circumvent court intervention altogether.

Questions:

- How can the process of resolving child custody/access disputes be reformed to better serve the interests of children?
- What is the role of alternative dispute resolution in the resolution of these disputes?
- How, if at all, can the legislative framework ensure that only those separating and divorcing parents who are well suited to ADR are diverted to these alternative forums?
- How can this increasingly popular concept of streaming be framed within legislation?
- Is it possible to distinguish in law between those couples who may be well suited to these forums, and those who are not?
- How might the procedures of family law be reformed to ensure that the right parties are directed to the right procedures?

VIII. CONCLUSION

Since May 1997 when this discussion paper was initially drafted, the Federal Government has renewed its commitment to examining legal reforms to child custody and access. To this end it has established a joint committee of the Senate and House of Commons which is to report to Parliament by November, 1998. Public hearings before the joint committee are to begin as early as February 1998. Child custody and access is, understandably, for many, an extremely personal and emotional issue. No doubt in the near future both the joint committee and the general public will be exposed to poignant, vociferous and sometimes inflammatory accounts of how the existing system of

custody and access law does an injustice to children and their parents. We do need to listen to these accounts. However substantive and procedural reforms to the current law must be informed by a reasoned and critical analysis of the existing law *and* the proposed reforms, including an assessment of the practical results which have been achieved in those jurisdiction where similar reforms have been implemented.

The objective of this discussion paper has been to raise questions that are in need of further debate and research. It would, as such, be premature to offer any categorical or clear-cut conclusions. Our discussion has attempted to canvas the issues and options that are currently under consideration, and we have attempted to highlight some of the possibilities, challenges and limitations associated with these various reform options. Overall, our tone has been one of caution. The legal regulation of child custody and access has long been plagued with conflict and complexity, and there is no reason to believe that there are any easy answers to these problems. From changing the language, to adopting shared parenting schemes, the various options for reform canvassed in this discussion paper raise as many questions as they answer.

The message that emerges from a review of the literature as well as the developments in other jurisdictions is one of caution and circumspection. There is not yet sufficient evidence to establish that these experiments have been successful in promoting the best interests of children on divorce, and even less evidence as to their suitability in the Canadian context. We are not saying that these approaches might not prove to be viable and successful options in better promoting the interests of children following marital breakdown, but simply that it is still too early to tell. The reforms that have been pursued in other jurisdictions should be closely monitored, and if possible, researched in order to better assess the relative success of these new approaches before any decision is taken about embarking on one of these approaches in Canada.

Appendix 'A'

U.N. Convention on the Rights of the Child

Article 9

3. State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interest of the child will be their basic concern.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or

exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Appendix 'B'

Best Interests Factors Identified in Provincial and Territorial Legislation Relating to Custody and Access (Source: Custody and Access Public Discussion Paper, Department of Justice, 1993 at 51-52)

- the conduct of the parents
- the wishes of the father and the mother
- the health and emotional well-being of the child including any special needs for care and treatment
- where appropriate the views of the child
- the love, affection and similar ties that exist between the child and other persons
- education and training for the child
- the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise these rights and duties adequately
- the effect upon the child of any disruption of the child's sense of continuity
- the love, affection and ties that exist between the child and each person to whom the child's custody is entrusted, each person to whom access to the child is granted and, where appropriate, each sibling of the child
- the child's cultural and religious heritage
- the length of time the child has lived in a stable home environment
- the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and the special needs of the child
- the ability of each parent seeking custody or access to act as a parent
- plans proposed for the care and upbringing of the child

- the permanence and stability of the family unit with which it is proposed that the child will live
- the relationship by blood or through an adoption order between the child and each person who is party to the application
- the personality, character and emotional needs of the child
- the capacity of the person who is seeking custody to act as legal custodian of the child
- the home environment proposed to be provided for the child
- the plans that the person who is seeking custody has for the future of the child
- the effect that awarding custody or care of the child to one party would have on the ability of the party to have reasonable access to the child.

Additional Best Interests Factors

- the love, affection and ties between the child and members of the child's family who do not reside with the child
- the views and preferences of the child depending on the maturity of the child and the extent to which those views and preferences support the other best interest criteria
- the adaptability (adjustment) of the child to the proposed parenting plans
- each applicant's ability to recognize, in the parenting plan, the value to the child of maintaining family and other significant ties
- the applicant's relative contribution to child care prior to the application
- each applicant's history of violence or abuse toward any member of the child's household (Source: Gary Austin, Brief at 9-10)
- that a child cannot be required to express his or her wishes in relation to any matter
- whether it would be preferable to make the order that would be least likely to lead to the institution of further

proceedings

- the difficulty and expense of maintaining contact. (Source: The *Family Law Reform Act 1995* s 68F.)